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IN THE SUPREME COURT OF THE UNITED STATES

WALTER D. DISNEY
HOSPITAL CORPSMAN FIRST CLASS, UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Congress exceed its authority under the Commerce Clause by proscribing the purely local, intrastate storage of stolen explosive materials under 18 U.S.C. § 842(h)?

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PETITION FOR A WRIT OF CERTIORARI

Hospital Corpsman First Class (Petty Officer) Walter D. Disney, U.S. Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces rendered in this case on September 27, 2005.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App. A, *infra*, at 1a – 15a) is reported at 62 M.J. 46 (C.A.A.F. 2005). The opinion of the Navy-Marine Corps Court of Criminal Appeals (App. B, *infra*, at 16a – 25a) is unpublished.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps of Criminal Appeals on September 27, 2005. This Court's jurisdiction is invoked under 28 U.S.C. §1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution reads:

> The Congress shall have to Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.[1]

STATUTORY PROVISION INVOLVED

18 U.S.C. § 842(h) reads:

> It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.

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[1] U.S. Const. art. I, § 8, cl. 3.

STATEMENT OF THE CASE

This case raises the issue of Congress's power under the Commerce Clause to exercise general police power. Petty Officer Disney was convicted of stealing explosives under Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. Petty Officer Disney was also convicted under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, incorporating 18 U.S.C. § 842(h): the storage of stolen explosive materials. He was not convicted of stealing the explosives under Title 18. It was only the purely local, intrastate storage of the stolen explosives, in a private garage, that implicated Title 18 of the U.S. Code.

Petty Officer Disney was a Navy SEAL with thirteen years of service at the time of his court-martial. He had leased a house in Coronado, California. Appellant shared the house with Petty Officer Joshua Leasure, U.S. Navy, and Petty Officer Leasure's wife, Kari Leasure. Appellant and the Leasures all had full access to the house and garage. The Leasures were permitted to, and did, store their personal belongings in the garage. While cleaning the garage on or about January 7, 2000, Kari Leasure found some boxes too heavy to move. In an attempt to lighten the boxes, she opened one unlocked box and found ammunition inside. In response to this discovery, Kari Leasure called a command master chief,[2] who came to the house with the ordnance officer from Appellant's command. The master chief and ordnance officer then opened the remaining boxes and discovered small-arms ammunition, explosives, and pyrotechnics, which were property of the United States.

During the guilty-plea inquiry at Petitioner's court-martial, the military judge asked Petty Officer Disney whether the explosives were part of interstate commerce:

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[2] The command's most senior enlisted member.

MJ: And do you admit that those items were either moving as, or were part of, or had been shipped or transported in interstate or foreign commerce?

ACC: Yes, sir. I believe they had all been made and shipped prior to and in interstate commerce.

MJ: Okay. And why do you believe that? [The accused and his counsel conferred.]

ACC: Sir, the list that I was provided through Mr. Bash states that these different items and lists the items specifically and shows that they were all made in states other than California, therefore they were all shipped through interstate commerce.

MJ: Okay. So sometime prior to their being stolen materials, they were shipped in interstate commerce?

ACC: That's my understanding, yes, sir.

MJ: And by that, it's your understanding that they were made in one state and then shipped eventually into California?

ACC: Yes, sir.

MJ: Did you transport them or know personally that they were shipped between states after they were stolen?

ACC: [No response.]

MJ: Let me break that up. Did you transport them between two different states?

ACC: No, sir.

MJ: Okay. But you believe that between their manufacture and the time that they were stolen, they were shipped in interstate commerce?

ACC: Yes, sir.

MJ: And that's based on their place of manufacture?

ACC: Yes, sir.

The government presented nothing else to support a link between the purely local, intrastate storage of stolen explosives and a substantial affect on interstate commerce.

REASONS FOR GRANTING THE PETITION

In regulating the purely local, intrastate storing of stolen explosives, Congress exceeded its authority under the Commerce Clause. Petty Officer Disney stored stolen explosives in the garage of his private residence where it remained until discovered by his roommate. Based on that limited conduct alone, he was prosecuted for violating 18 U.S.C. § 842(h), which prohibits storing stolen explosives that traveled in interstate commerce.

At issue here is whether that statute may constitutionally reach non-economic, purely intrastate, individual conduct where there is no evidence to conclude

that the conduct affected interstate commerce in any way, much less substantially.

As Chief Justice Marshall declared in *McCulloch v. Maryland*:

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.[3]

The Constitution delegates to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[4] As "[c]omprehensive as the word 'among' is, it may be very properly be restricted to that commerce which concerns more State than one . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State."[5]

Congress may only use its power under the Commerce Clause to regulate: 1) the use of channels of interstate commerce, 2) the instrumentalities of interstate commerce, and 3) those activities that substantially affect interstate commerce.[6] Here, as in *Lopez*, the statute does not seek to regulate channels or instrumentalities of interstate commerce, and the only question was whether the statute

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[3] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

[4] U.S. Const. art. I, § 8, cl. 3.

[5] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

[6] *United States v. Lopez*, 514 U.S. 549, 558 (1995).

regulated those activities that substantially affect interstate commerce.[7]

In *United States v. Morrison*, this Court established a four-part test to analyze whether a regulated activity substantially affected interstate commerce as understood in *Lopez*.[8] That four-part test considers:

> 1) whether the statute regulated economic or non-economic activity,
>
> 2) whether the statute contained an express jurisdictional element,
>
> 3) whether Congress made findings regarding the connection to interstate commerce, and,
>
> 4) whether the link between the prohibited activity and a substantial affect on interstate commerce was attenuated.[9]

The statute at issue in *Morrison* was 42 U.S.C. § 13981, which provided a civil federal remedy to victims of gender-motivated violence. *Morrison* concluded that the Commerce Clause did not provide Congress with the authority to enact section 13981.[10] In analyzing the four considerations, the *Morrison* Court found legislative history supporting Congress's belief in the serious impact of gender-motivated violence on victims and their families.[11] But *Morrison* determined that "the existence of congressional findings is not sufficient, by itself, to sustain the

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[7] *Id.* at 559.
[8] *United States v. Morrison*, 529 U.S. 598, 611-12 (2000).
[9] *Id.*
[10] *Id.* at 619.
[11] *Id.* at 614.